SEABED COUNCIL CONTINUES DELIBERATIONS ON SULPHIDES REGULATIONS AS ISA FIFTEENTH SESSION ENTERS SECOND WEEK

The fifteenth session of the International Seabed Authority entered its second week in Kingston this morning with the Council continuing deliberations on the outstanding issues related to the draft regulations on prospecting and exploration for polymetallic sulphides in the Area beyond the limits of national jurisdiction.

The 36-member Council is moving to adopt the regulations before the current session ends on Friday, June 5. The draft as it currently stands consists of a preamble and 45 articles organized into ten parts, and including four annexes.

During the previous session in 2008 the Council continued its detailed consideration of the revised draft regulations. It agreed to continue work on the outstanding regulations and also requested the Secretariat to provide additional background material on the remaining outstanding issues as well as a revised text of the whole draft regulations. This is contained in document ISBA/15/C/WP.1.

Resuming this morning the President of the Council, Mr. Mahmoud Samy (Egypt), said the issues outstanding were interlocking and, as such, “nothing is agreed until everything is agreed”.

Overlapping Claims

Deliberations began over a proposal from China to address the issue of overlapping claims by amending the draft text in regulation 22 and 23. China said its proposal was based on the need for fair and equitable settlement of disputes, with all parties having a say and the Secretariat and Council playing a key role.
China proposed amending paragraph (c) of regulation 22 Receipt, acknowledgement and safe custody of application, to include examples of general information. The paragraph, as amended, reads as follows:

The Secretary-General shall:

(c) Notify the members of the Authority of the receipt of such application and circulate to them information of a general nature which is not confidential regarding the applications, including ‘a chart’ and ‘a list of geographical coordinates’ referred to in paragraph 17, section II of Annex 2.

India and the Russian Federation argued for the confidentiality of charts and geographical coordinates saying that making such information available to all would not be supportive of fair competition.

The amendment proposed to regulation 23 included language to stipulate that applicants “shall use their best efforts to avoid” overlapping of the areas in their applications. It also extended the period reserved for the settlement of overlapping claims dispute from 60 to 90 days, before it may be submitted to binding arbitration, and sets out the basis of a fair and equitable solutions, as follows:

“3. Whichever means is taken to resolve any conflict concerning overlapping claims, consideration of the following factors with respect to the applicants concerned shall constitute the basis of a fair and equitable solution:

1. The location and number of polymetallic sulphides sites that have been discovered in any area of conflict and the date of each discovery.

2. The workload, continuity and extent of survey activities with respect to polymetallic sulphides conducted in any area of conflict, and,

3. The financial cost of such survey activities conducted in any area of conflict, which is measured in constant United States dollars.”

Many delegations supported the proposed amendment calling it “timely”, “constructive”, and worded to move the Council’s work forward. Some delegations expressed reservations about the extended overlapping dispute resolution period. South Africa, supported by New Zealand argued that 90 days could help to stall the resolution process. Germany, which had earlier expressed preference for the first-come-first-served approach, said even 30 days between the Secretary-General’s notification of the conflict and resolution among competing applications was too long.

Arguing against the first-come-first-serve approach to resolving overlapping claims, China noted that inadequate knowledge about sulphides could constrain the Council in its judgment of an application meeting all the criteria. Supporting the views expressed by China, Bangladesh joined the Council’s President, Mr. Mahmoud Samy, (Egypt), in urging members to press for compromise on the issue.

Delegations, including New Zealand, Jamaica, Ghana, Uganda, Trinidad and Tobago and The Republic of Korea said they would be willing to assist in working out a resolution with China before the meeting resumed this afternoon.
Force majeure

The Council proceeded to examine the issue of force majeure as it related to the suspension or termination of contracts. The Secretariat’s review of the outstanding issues concerning the draft regulations on sulphides (ISBA/15/C/WP.2) proposed adding a new paragraph (d) to Section 21 of Annex 4: standard clauses for exploration contract. This paragraph would allow the Council to suspend or terminate a contract if the contractor could not perform its obligations by reason of an event of force majeure which had persisted for more than two years.

China expressed some misgivings about the proposed paragraph. It said that by definition, force majeure was an occurrence beyond human control rather than one arising from the action of any contractor. Giving the Council the unilateral right to terminate contracts could lead to undesirable consequences for the contractors. The Chinese representative felt that if while the effects of force majeure continued to prevent the contractor from fulfilling his obligations there should be some scope for discussion between the Council and the contractor. On the other hand, if the contractor was unable to perform his duties after the force majeure came to an end, termination would be justifiable. A distinction should be made between the two scenarios, he maintained.

The Chinese delegation expressed willingness to discuss the issue with other members and return to the matter at this afternoon’s meeting. Nigeria raised the point that setting a time limit of two years might not be appropriate without full knowledge of the extent of the problem the contractor faced.

As far as unilateral nature of termination was concerned, the Secretariat noted that the International Seabed Authority had a systematic procedure by which contracts were terminated. That procedure gave contractors prior notice of the possibility of termination, and an opportunity to dispute the action. Moreover, no contract could be suspended or terminated unless there was “a final binding decision in accordance with Part XI, section 5, of the Convention”.

Several delegations, including Argentina, Bangladesh, France, Germany, Jamaica and Japan expressed the view that the Secretariat’s wording of paragraph d) was acceptable in its present form. Mexico, Netherlands, Senegal, South Africa and Viet Nam added their voices to the consensus on the paragraph.

Trinidad and Tobago suggested that the paragraph merited a closer examination as requested by China. Sudan and Ghana pointed out that the circumstances of each case should inform the Council’s decision whether to suspend or to terminate a contract. Delegations agreed to hold consultations immediately following the Council’s morning meeting before returning at 3 p.m. to continue its consideration of this and other outstanding matters concerning the draft regulations for polymetallic sulphides.

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